



0000152496

**GUST ROSENFELD P.L.C.**  
One E. Washington, Suite 1600  
Phoenix, Arizona 85004-2553  
602-257-7422 Fax 602-254-4878  
David A. Pennartz – 006429  
dpennartz@gustlaw.com  
Landon W. Loveland – 024033  
lloveland@gustlaw.com

RECEIVED

2014 APR 16 P 12:19

ARIZONA CORPORATION COMMISSION  
DOCKET CONTROL

Arizona Corporation Commission

**DOCKETED**

APR 16 2014

DOCKETED BY

**Attorneys for Intervenor City of Sedona****BEFORE THE ARIZONA CORPORATION COMMISSION****COMMISSIONERS****BOB STUMP, Chairman****GARY PIERCE****BRENDA BURNS****BOB BURNS****SUSAN BITTER SMITH****ORIGINAL**

IN THE MATTER OF THE  
APPLICATION OF ARIZONA PUBLIC  
SERVICE COMPANY FOR APPROVAL  
OF AUTOMATED METER OPT-OUT  
SERVICE SCHEDULE 17.

Docket No. E-01345A-13-0069

**INTERVENOR CITY OF  
SEDONA'S MOTION FOR  
PROCEDURAL ORDER TAKING  
OFFICIAL NOTICE OF FILINGS  
IN GENERIC DOCKET  
E-00000C-11-0328 ON OPT-OUT  
FEES, TERMS AND CONDITIONS**

Intervenor, the City of Sedona ("Sedona") requests that the Arizona Corporation Commission issue a Procedural Order taking official notice of the filings in Docket E-00000-11-0328 ("Generic Docket") that relate to APS' Application in this docket. As detailed below, many filings in the Generic Docket address APS' charges and terms and conditions under which APS' customers may "opt-out" of having their analog electrical meter replaced by a so-called "Smart Meter." Sedona formally requests the Commission take official notice of these filings in the Generic Docket as part of its consideration of APS' Application in this docket.

1 Sedona requests that the Commission enter a Procedural Order taking official  
2 notice in this docket of the filings in the Generic Smart Meter Docket and consider them  
3 to the extent that they bear on the decisions the Commission makes on APS'  
4 Application. Specific references to documents filed in the "Generic" Docket that may  
5 be made in the official testimony and other hearing filings pursuant to the process  
6 outlined in Subsection T, will be provided in a timely manner to permit APS an  
7 opportunity to respond under provisions of the anticipated Scheduling Order. This  
8 motion is made pursuant to the Commission's Rules of Practice and Procedure,  
9 including Ariz. Admin. Code, Sec. R14-3-109, Subsection T, on Official Notice, and  
10 Subsection K referencing the Arizona Rules of Evidence. Subsection T states:

11 T. Official notice. The presiding officer may take official notice of the following  
12 matters:

13 1. Rules, regulations, official reports, decisions and orders of the Commission  
14 and any regulatory agency of the state of Arizona.

15 2. Contents of decisions, orders, certificates and permits issued by the  
16 Commission.

17 3. Matters of common knowledge and technical or scientific facts of established  
18 character.

19 4. Official documents, if pertinent, when properly introduced into the record of  
20 formal proceedings by reference; provided, however, that proper and definite  
21 reference to such document shall be made by the party offering the same and that  
22 the same is published and generally circulated so that an opportunity shall be  
23 given to all of the parties of interest at the hearing to examine the same and  
24 present rebuttal evidence.

25 5. *Such other matters as may be judicially noticed by the Courts of the state of  
26 Arizona.*

27 Referencing paragraph 5 (and to some extent paragraphs 1 and 2) above, the  
28 Commission is permitted to take official notice in the APS Docket of "opt-out" filings  
29 in the Generic Docket. Courts in Arizona routinely take judicial notice of filings and  
30 rulings in related cases before the Court, where appropriate and applicable. *In re Sabino*  
31 *R.*, 198 Ariz. 424, 425, ¶ 4, 10 P.3d 1211, 1212 (App. 2000) ("It is proper for a court to

1 take judicial notice of its own records or those of another action tried in the same  
2 court.”); *State v. Astorga*, 26 Ariz.App. 260, 261, n. 1, 547 P.2d 1060, 1061 (1976) (“A  
3 court may take judicial notice of the record in another action tried in the same court.”),  
4 citing, *Reidy v. O'Malley Lumber Company*, 92 Ariz. 130, 132-33, 374 P.2d 882, 884  
5 (1962). Courts also will take judicial notice of the record in administrative proceedings  
6 where pertinent to the issues under consideration in the court action. A state agency  
7 may take judicial (or official) notice in its proceedings of materials submitted in another  
8 docket to the same extent and with the same restrictions as provided in law for the  
9 Superior Court, Rule 201, Ariz. R. Evid. *Phelps Dodge Corp. v. Ford*, 68 Ariz. 190,  
10 198, 203 P.2d 633, 639 (1949); Ariz. Admin. Code, Sec. R14-3-109 (T)(5).

11       So long as the applicant is given an opportunity to address and respond, it has for  
12 several decades been the rule that various federal, state and local bodies and agencies  
13 may take “judicial,” “official,” or “administrative” notice of the records in other  
14 proceedings held before them as substantive evidence or as part of the background for  
15 the decision the agency is asked to make.

16	AGENCY/NOTICE	CASE LAW
17	Arizona Supreme Court takes judicial notice of ACC	<i>Arizona Corp. Comm’n. v.</i>
18	files, applications, corporate restructuring of APS	<i>State ex rel., Woods</i> , 171 Ariz.
19	by Pinnacle West Capital, and news articles on these	286, 289, n. 4, 830 P.2d 807,
20	matters and a separate utility, Tucson Electric Power	810 (1992)
21	Co., financial constraints and bankruptcy risks	
22	Supreme Court takes notice of records of State	<i>State ex re. Smith v. Bohannan</i> ,
23	Retirement Board for information pertinent to	101 Ariz. 520, 522-23, 412 P.2d
24	charge of public official’s conflict of interest	877, 879-880 (1966)
25	“It is well established that, as long as a party	<i>City of Erie v. Pap’s A.M.</i> , 529
26	has an opportunity to respond, an administrative	U.S. 277, 298, 120 S.Ct. 1382,
	agency may take official notice of such ‘legis-	1395, 146 L.Ed.2d 265 (2000)
	lative facts’ within its special knowledge, and is	(O’Conner, J., Part IV opinion
	not confined to the evidence in the record in	of the Court)
	reaching its expert judgment.”	

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**AGENCY/NOTICE**

**CASE LAW**

Nevada Gaming Commission and Nevada Gaming Control Board “may take ‘judicial notice’ of facts . . . like any Article III [federal] court.”

*Romanov v. Bible*, 169 F.3d 1182, 1187 (9th Cir. 1999), citing U.S. Supreme Court decision in *Imbler v. Pachtman*, 424 U.S. 409, 430–31, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976)

It is “a principle of administrative law that when an agency takes official or administrative notice of facts, a litigant must be given an adequate opportunity to respond.”

*Heckler v. Campbell*, 461 U.S. 458, 469. 103 S.Ct. 1952, 1958, 76 L.Ed.2d 66 (1983)

California Industrial Commission “could undoubtedly take judicial notice of its own records,” as part of the basis for a decision on an application for worker compensation medical benefits in dispute over work related injury.

*National Auto & Cas. Ins. Co., v. Industrial Acc. Commn. Cal.*, 95 CalApp. 2d 10, 15, 212 P.2d 1, 4 (1949)

Here, the Commission’s procedural rules have been adopted to take advantage of this precedent.

Sedona on behalf of itself and its citizens requests that the filings in the Generic Docket addressing “opt-out” fees and conditions be considered in this docket as well. It would be a monumental waste of time and resources to require duplicate filings in both dockets. Regardless of the reasons why someone may choose to continue to use an analog meter, once they have made that decision, the up-front fees, the monthly charges and the other terms and conditions then become a critical concern to them.

APS has used and is using its rights as a state-granted monopoly electric utility CC&N holder to advance its business interests by way of forced meter conversions and the proposed “opt-out” charges and conditions. Arizona is a regulated monopoly state with respect to the operations of public service corporation utility providers. That monopoly is not granted, however, for the benefit of the utility. It seems that APS, as did the water utility in *Davis v. Corporation Commission*, 96 Ariz. 215, 218, 393 P.2d 909, 911 (1964) (emphasis in original),

1 “misconceives the fundamental nature of the Certificate of *Public*  
2 Convenience and Necessity and the implications of the theory of the  
3 *regulated* monopoly which has been adopted in Arizona. The  
4 monopoly is tolerated only because it is to be subject to vigilant and  
continuous regulation by the Corporation Commission.”  
(Emphasis in original.)

5 CC&Ns can only be acquired from the Corporation Commission by showing that the  
6 monopoly service it authorizes “would best serve the public interest.” *Id.* The measure,  
7 therefore, that APS’ Application must meet is whether it serves not merely the financial  
8 interests of the utility, but whether it best serves the utility customers.

9 In the 26 filings made in the Generic Docket in 2014, 17 (65.4%) of them  
10 mentioned APS’ proposed “opt-out” terms and charges to at least some degree, while  
11 about half as many filings (34.6%) made comments that did not address opt-out issues  
12 or concerns. Thus, as many as 2/3 of those people filing comments in the Generic  
13 Docket address opt-out concerns and issues, which goes to whether granting APS’  
14 Application best serves the public interest.

15 Members of the public filing comments bearing on that issue would need to (A)  
16 make duplicate filings in this APS Application Docket as well; or (B) address the  
17 Commission in public comments during the hearing on the Application, to ensure that  
18 their concerns were of record on the Application, if the Commission declines to take  
19 official notice of the comments. Some members of the public may choose to file  
20 additional comments in the APS Docket or to speak at the hearing. However, taking  
21 official notice of filings on opt-out issues in the Generic Docket will measurably  
22 streamline the Commission’s hearing and consideration of APS’ Application.

23 Granting Sedona's motion will foster the efficient use of time and resources of  
24 the Commission, its staff, and the parties and will not prejudice the Applicant. For all  
25 of these reasons, Intervenor Sedona requests the Commission take official notice of all  
26

1 filings in the Generic Docket that have been filed or will be filed addressing the terms  
2 and conditions for "opt-out" from APS' forced meter conversion scheme.

3 RESPECTFULLY SUBMITTED this 16th day of April, 2014.

4 GUST ROSENFELD P.L.C.

5 By:   
6

7 David A. Pennartz  
8 Landon W. Loveland  
Attorneys for Intervenor  
Town of Sedona

9 ORIGINAL AND THIRTEEN COPIES  
10 of the foregoing filed this 16th day  
of April, 2014 with:

11 Docket Control  
12 Arizona Corporation Commission  
1200 West Washington  
13 Phoenix, Arizona 85007

14 COPIES of the foregoing hand delivered/  
mailed this 16th day of April, 2014 to:

15 Thomas L. Mumaw  
16 Melissa M. Krueger  
Pinnacle West Capital Corporation  
17 400 North 5<sup>th</sup> Street,  
MS 8695  
18 Phoenix, Arizona 85004  
*Attorneys for Arizona Public Service*

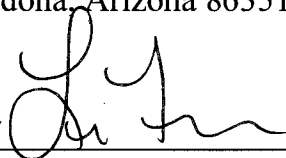
19 Patty Ihle  
20 304 East Cedar Mill Road  
Star Valley, Arizona 85541

21 Tyler Carlson  
22 P.O. Box 1045  
Bullhead City, Arizona 86430

23 Lewis Levenson  
24 1308 East Cedar Lane  
Payson, Arizona 85541

25 Patricia Ferre  
26 P.O. Box 433  
Payson, Arizona 85547

1 Michael Curtis  
501 East Thomas Road  
2 Phoenix, Arizona 85012-3205  
  
3 Charles Moore  
1878 West White Mountain Boulevard  
4 Lakeside, Arizona 85929  
  
5 Warren Woodward  
55 Ross Circle  
6 Sedona, Arizona 86336  
  
7 Steve Olea  
Arizona Corporation Commission  
8 1200 West Washington  
Phoenix, Arizona 85007  
9  
10 Janice Alward  
Arizona Corporation Commission  
1200 West Washington  
11 Phoenix, Arizona 85007  
  
12 Lyn Farmer  
Arizona Corporation Commission  
1200 West Washington  
13 Phoenix, Arizona 85007-2927  
14  
15 Clara Marie Fritz  
60 Roca Roja Road  
Sedona, Arizona 86351

16  
17   
18 /s/ \_\_\_\_\_

2154174.1